Legal Services Corporation
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OFFICE OF LEGAL AFFAIRS

RULEMAKING OPTIONS PAPER

TO: Operations & Regulations Committee

FROM: Mattie Cohan, Senior Assistant General Counsel

DATE: January 22, 2010

SUBJECT: Rulemaking Options Paper – 45 CFR Part 1642 –Attorneys' Fees

As you know, the FY 2010 LSC appropriation legislation does not contain any statutory restriction on the claiming, collection and retention of attorneys' fees by recipients. This represents a change of the statutory requirement that has been imposed on recipients each year since FY 1996. Since 1996, LSC has also had regulations found at 45 CFR Part 1642 regulatorily implementing the statutory attorneys' fees restriction. Those regulations remain effective unless and until the Board of Directors amends or repeals them. Pursuant to the Opinions Protocol, attached for your consideration and action is a Rulemaking Options Paper setting forth issues and options regarding possible amendment action in light of the recent statutory change.

Background

Statutory Restriction

LSC's FY 1996 appropriation legislation provided that:

> [n]one of the funds appropriated in this Act to the Legal services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a recipient) . . . that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees. . . .

Section 504(a)(13), Pub. L. 104-134, 110 Stat. 1321 (April 26, 1996).[1] Since appropriations legislation expires with the end of the Fiscal Year to which it applies, for the statutory restriction on attorneys' fees to remain in place by statute, it needed to be, and was, carried forth in each subsequent appropriation law by reference. In FY 1998, Section 502 (a) of LSC's appropriation provided that:

[1] This restriction was carried forth in each subsequent appropriation law from FY 1997 through FY 2009. See, e.g., Consolidated Appropriations Act, 2009, Pub. L. 111-8, 123 Stat. 524 (March 11, 2009).

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> None of the funds appropriated in this act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of . . . Section 504 of Public Law 104-134 (110 Stat 1321-53 et seq. and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section . . . .[2]

Pub. L. 105-119, 111 Stat. 2440 (November 27, 1997). Subsequently, each appropriation law since FY 1998 has included a provision incorporating section 502 of the FY 1998 by reference. Thus, since FY 1999, each appropriation has incorporated by reference the provision in the FY 1998 law (Section 502) which incorporated by reference the attorneys' fees restriction found in paragraph (a)(13) of section 504 of the FY 1996 law.

On December 16, President Obama signed the Consolidated Appropriations Act of 2010 into law. Pub. L. 111-117. This act provides LSC's appropriation for FY 2010. Like its predecessors, this law provides that:

> None of the funds appropriated in this Act to the 12 Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections . . . .

However, section 533 of that same law also provides that:

> Section 504(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996 (as contained in Public 4 Law 104-134) is amended by striking paragraph (13).

Id. at §533. Taken together, these provisions serve to incorporate by reference all of the restrictions in section 504 of the FY 1996 law, except for paragraph (a)(13). As such, there is no current statutory restriction on LSC providing the money FY 2010 appropriated to it to any recipient which claims, or collects and retains attorneys' fees.[3]

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[2] The FY 1998 bill goes on to provide for a couple of exceptions to the restrictions contained in the FY 1996 law. These exceptions are not germane to the attorneys' fees restriction and are not further discussed.

[3] Notwithstanding the colloquial usage of the terms "'96 restrictions" to refer to the attorneys' fees restriction (and other restrictions adopted with that law) and "Lifting" of the restriction to refer to Congress' recent action, it is important to remember that the FY1996 appropriations act and the restrictions contained therein legally ceased to exist with the expiration of that fiscal year. Thus, from a legal standpoint, the restrictions have been *re-imposed anew* each year. The particular mechanism the Congress has used to re-impose the restrictions each year has been by incorporation through reference to the *language* of the FY 1996 law, instead of restating all of the text of the restrictions. Thus provision of section 533 of the current law amending the 1996 appropriation law has the effect of limiting the text being incorporated by reference to exclude the attorneys' fees restriction, such that Congress has acted to not reimpose the attorneys' fees restriction in FY 2010.

Regulatory Restriction

LSC adopted regulations found in 1996 and 1997 which implemented the statutory attorneys' fees restriction. 45 CFR Part 1642; 61 Fed. Reg. 45762 (August 29, 1996); 62 Fed. Reg. 25862 (May 12, 1997). The attorneys' fees regulation restates the basic prohibition on claiming or collecting and retaining attorneys' fees:

> Except as permitted by §1642.4, no recipient or employee of a recipient may claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient.

46 CFR §1642.3. The regulation provides further guidance to recipients by, among other things, providing a regulatory definition of attorneys' fees; setting forth rules for the applicability of the restriction to private attorneys providing legal assistance to a recipient's private attorney involvement program; and providing express authority to recipients to accept reimbursements of costs from a client. The regulation also sets forth rules for the accounting for and use of those attorneys' fees which recipients are not prohibited from claiming, collecting or retaining.

The regulation remains in place notwithstanding the lifting of the statutory restriction. LSC has inherent rulemaking authority to adopt requirements by regulation not specifically required by statute, provided that they are not prohibited by statute and otherwise are within the scope of LSC's statutory authority. *TRLA v. LSC* (940 F.2d 685 (D.C. Cir. 1991); *see also*, 45 CFR §1610.7(a)(extending the statutory restrictions on a recipient's non-LSC funds to the non-LSC funds of a subgrantee of LSC funds) discussed at 62 Fed. Reg. 27695 at 27696-96 (May 21, 1997).[4] The adoption of the attorneys' fees restriction is within LSC's inherent statutory authority. The current law merely lifts the statutory restriction, but does not affirmatively provide recipients the right to claim or collect and retain attorneys' fees, nor does it prohibit LSC from

[4] *Cf.* Department of Health and Human Services (HHS) final rule amending an HHS regulation classifying HIV infection as a communicable disease of public health significance (which resulted in a ban on travel into the United States by HIV-positive aliens). 74 Fed. Reg. 56547 (November 2, 2009). In this situation, HIV infection had been included in the definition of "communicable disease of public health significance" by statute, but Congress amended the statute in 2008 to delete HIV infection from the definition. HHS, however, retained HIV in the list of communicable diseases of public health significance by regulation. The statutory change had no legal impact on the validity of the regulation or the authority of HHS to retain or amend the regulation. As noted in the preamble to the final rule:

> In summer 2008 Congress amended the [Immigration and Naturalization Act] by striking "which shall include infection with the etiologic agent for acquired immune deficiency syndrome," *thereby leaving to the Secretary of HHS the discretion* for determining whether HIV infection should remain in the definition of communicable disease of public health significance provided for in 42 CFR 34.2(b).

Id. at 56548 (emphasis added). With the new final rule HHS is amending the regulation to remove HIV-infection from the definition.

restricting a recipient's ability to claim or collect and retain attorneys' fees.[5] Thus, the regulatory restriction remains effective absent affirmative action by LSC to change it.

Options

The Board has a variety of options available to it at this juncture, ranging from leaving the current regulation in place and in force, to amending the regulation. These options are discussed in some detail below.

Option 1 – Doing Nothing – Leaving the Current Regulation in Place As Is

The Board could elect to not make any changes to the regulation. Under this option, LSC would leave in place without change the regulatory prohibition on claiming, and collecting and retaining attorneys' fees. The Board could select this option for procedural or substantive reasons.

The Board could elect to not engage in any substantive consideration of the matter at all in deference to the fact that the Board is in the midst of turnover. There are, currently, five nominees awaiting full Senate confirmation and another three whose nominations are still under consideration by the Senate Health, Education, Labor and Pensions Committee. With the coming change in Board membership, the Board could elect not to make any regulatory changes at this time, and instead to maintain the status quo pending the appointment of the new Board members. This would provide the greatest flexibility to the incoming Board members to adopt new policies of their own choosing with regard to the retention or amendment of the attorneys' fees restriction.[6]

On the other hand, given that there are still two positions for which nominations have not yet been made, that three of the nominees are still awaiting Committee action (let alone full Senate confirmation), and that the five nominations awaiting floor action continue to be subject to a hold, it is not at all clear when there will be a new Board (in whole or part) in place. Until such time as there is a new Board, the sitting Board members remain in place and have a continuing obligation to move the business of the Corporation forward. As such, there is a strong argument to be made that the current Board can and should move forward with substantive consideration and action on this issue.

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[5] The legislative history certainly suggests that Congress expects the regulatory restriction will be lifted. See note 7, below. However, report language is not statutory language and does not affect LSC's *legal authority* in this matter. When Congress has intended to curtail LSC's authority to issue or enforce regulations it has expressly done so. See, e.g., Pub. L. 102-140, 105 Stat. 824 and Pub. L. 101-515, 104 Stat. 2101 (appropriations acts in 1990 and 1991 restricting LSC's authority to impose by regulations requirements on recipient governing bodies that are additional to or more restrictive than the LSC Act).

[6] Of course, a new Board could choose to engage in additional rulemaking anyway, even if this Board does act to amend the regulation.

Assuming that the Board is going to consider the substantive merits of reviewing the regulation at this time, the Board could substantively determine that it wishes as a policy matter to retain the regulatory restriction without amendment. That is, the Board could determine that it agrees with the reasoning advanced in the legislative history of the 1996 restriction that LSC recipients are supported by public resources in order to provide free legal aid to their clients, and therefore, it is inappropriate for attorneys fees to be collected for free legal aid. *See*, H. Rep. 104-196. The board could also, determine some other basis upon which it finds the attorneys' fees restriction to be appropriate and choose to retain the restriction for such other reasons as it might articulate.[7]

There are strong arguments, however, favoring the adoption of a change in policy and the repeal of the attorneys' fees regulatory restriction. The lifting of the restriction indicates that Congress itself has had a change of heart regarding this restriction. Although Congress did not prohibit LSC from retaining the restriction, the fact that Congress chose not to reimpose this particular restriction (and no others) does indicate that support for this restriction has waned and that the policy arguments in support of the original restriction are no longer reflective of the will of Congress. To the contrary, the legislative history suggests that Congress chose not to reimpose the attorneys' fees restriction in express recognition of the fact that the restriction imposes several significant burdens on recipient.[8]

First, the ability to make a claim for attorneys' fees is often a strategic tool in the lawyers' arsenal to obtain a favorable settlement from the opposing side, particularly when the

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[7] For example, the Board could agree with an argument advanced by supporters of an attorneys' fee ban during discussions of an LSC reauthorization bill:

> The Committee has concluded that if attorneys fees are available to a client regarding any particular cause of action, it will be attractive to a private sector lawyer. Considering the fact that legal services lawyers represent only 20 percent of the poor, and so many eligible clients are refused representation, the Committee has concluded that legal services lawyers should not be put in a position to be competing with the private bar for clients.

H. Rpt. 104-255 at p. 26. The reauthorization legislation did not pass, although a number of provisions of that legislation, including the attorneys' fees ban were included in the FY 1996 appropriations legislation. To the extent that the Board considers this position, it should be aware that the restriction on taking fee-generating cases remains in full force. This issue is discussed in further detail below. *See* note 9 below.

[8] The Conference Report states:

> A general provision in Title V of the bill revises the administrative provision in order to permit grantees to pursue the recovery of attorney's fees when recovery is permitted or required under Federal or State law. The conferees believe that this action will level the playing field between legal aid attorneys and their counterparts in the private sector and provide a potentially crucial source of additional revenue to legal aid providers in a year in which state and private funding sources are decreasing.

H. Rpt. 111-336 at p. 129. *See also*, H. Rpt. 111-149 at p. 163; Transcript of Hearing of the Subcommittee on Commerce, Justice and Science of the House Committee of Appropriations of April 1, 2009 at pp. 220-223.

monetary value of the underlying claim itself is not relatively small. Restricting a recipient's ability to avail itself of this strategic tool puts clients at a disadvantage and undermines clients' ability to obtain equal access to justice. The attorneys' fees restriction can also be said to undermine one of the primary purposes of fee-shifting statutes; namely to punish those who have violated the rights of persons protected under such statutes. Second, in a time of extremely tight funding, the inability of a recipient to obtain otherwise legally available attorneys' fees places an unnecessary financial strain on the recipient. If a recipient could collect and retain attorneys' fees, it would free up other funding of the recipient to provide services to additional clients and help close the justice gap.[9]

If LSC does not choose to lift its regulatory restriction, recipients will continue to function at a strategic disadvantage, to the detriment of clients. Similarly, if LSC does not choose to lift its regulatory restriction, recipients will continue to be denied an avenue for additional funding otherwise legally available to other litigants under Federal and State statutes and the common-law of the jurisdictions in which they practice.[10] Moreover, given the legislative history, a choice by LSC to retain the restriction such that recipients will be unable to realize the benefits from the statutory change Congress clearly appears to have intended may not be a wise political choice for LSC to make.

Option 2 – Repealing and /or Amending and/or Part 1642

If the Board chooses to consider the substantive merits of reviewing the regulation at this time, the Board could substantively determine that it wishes as a policy matter to lift the regulatory restriction on the claiming, collecting and retention of attorneys' fees. In this regard, it should be noted at the outset that when the LSC Board adopted the regulatory prohibition on claiming, and collecting and retaining attorneys' fees, it was done to implement the statutory restriction. The regulatory history of the regulation does not suggest that the Board shared the policy position of the Congress on this matter.[11] More importantly, as noted above, there are strong arguments favoring the adoption of a change in policy regarding the attorneys' fees restriction. Namely, as discussed under Option 1, above, the restriction imposes several significant burdens on recipients and the services they provide to their clients that can be alleviated by lifting the restriction; and there is likely an expectation in Congress that LSC will

[9] It should be noted that the LSC Act's restriction on recipients taking fee-generating cases (and the implementing regulatory restriction on fee-generating cases) are not affected by the lifting of the statutory ban on the claiming and collecting and retention of attorneys' fees and would not be affected by any regulatory amendment to Part 1642. Accordingly, amendment of Part 1642 would not have an adverse impact on the private bar nor provide any incentive for recipients to seek out fee-generating cases at the expense of the needs of other clients.

[10] See note 6, above.

[11] It is important to note, however, that notwithstanding what might have been the Board's preferences, LSC has taken the Congressional mandate regarding attorneys' fees seriously, implementing it and enforcing it to effectuate the will of Congress.

lift the regulatory restriction. If the Board selects Option 2 and wishes to lift the attorneys' fees restriction, there are important implementation issues for the Board's consideration.

Application with Respect to Prior Performed Work

As noted above, the new appropriation law merely no longer contains any restriction on the claiming, or collection and retention of attorneys' fees. As such there is no statutory limitation on LSC's authority to implement the lifting of its regulatory restriction. That is, LSC is legally within its authority to permit recipients to currently seek attorneys' fees for any otherwise permissible work done even while the attorneys' fees restriction was in place. It is also within its authority to decide that recipients will only be permitted to seek fees for work done after the lifting of the restriction.

New Work Only

One policy option would be to allow recipients to be able to claim and collect attorneys' fees in connection only with new cases undertaken after a date certain, most likely the date the appropriation law took effect or the date any amendment to the regulation went into effect.[12] This option has the advantage of having entirely prospective implementation, which is typically the way regulatory and statutory changes are implemented. However, this approach may be unnecessarily limited in scope.

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[12] If the Board elects to remove the restriction, but to limit the work for which recipients may claim or obtain attorneys' fees to new work only, the Board will also need to determine whether work done only after the effective date of the regulatory change would qualify or whether the Board would also include new work done after December 16, 2009, but prior to any rule change. (If the Board elects not to so limit the work for which a recipient may claim or collect attorneys' fees, this question is moot and need not be further considered.)

The only potential advantage of not including work done between December 16, 2009 and the effective date of a new regulation would be its simplicity. If the Board is going to differentiate between current and prior work, then it could be simplest if the dates that recipients can begin to claim or collect fees and the date for which the work for which they can claim or collect are the same, rather than including work done for the interim period between the statutory and regulatory change. This period is likely to be relatively brief and will not necessarily have a major impact, compared to the ultimate impact of lifting the restriction. There does not, however, appear to be any other, substantive, advantage to not including work done between December 16, 2009 and the effective date of a new regulation.

In contrast, there is a substantive advantage to including work done during the period between December 16, 2009 and the effective date of a new rule. Although that period could be relatively brief, depending on the procedural rulemaking path the Board chooses to follow (discussed below), the period could also be not brief. Either way, any attorneys' fees related to work done during the period of December 16, 2009 onward which a recipient might be able to obtain would undoubtedly be useful in these times of very tight budgets. Moreover, there appears to be a substantive disadvantage to not including work done between December 16, 2009 and the effective date of a new regulation. It is likely that there will be some cases in which the inability of a recipient to include work done in the period of December 16, 2009 to the effective date of a new regulation would have an adverse impact on the strategic position of those particular clients. That substantive disadvantage would appear to outweigh the small advantage in procedural simplicity of not including such work.

Under this option, a recipient would end up in the position of being able to claim attorneys' fees for some, but not all work done after the date selected. That is, work done in connection with new cases would be eligible for attorneys' fees claims, but work done at the same time for cases that happened to have been previously opened would not. It is hard to articulate any meaningful rationale for making this distinction. This option would be more difficult for both recipients and LSC to administer without a clear and compelling justification for the additional administrative complexity.

A variant of the first option could be to permit the claiming and collection and retention of attorneys' fees for any work (on new and ongoing) cases as of a date certain (again, most likely the effective date of the statutory change or the effective date of any regulatory change[13]). This variant would have the advantage of the first variant without the problem of drawing an unnecessary distinction between new and "open" cases. However, this variant too has significant drawbacks.

As noted above, this implementation variation ignores an unusual and important aspect of the restriction. The attorneys' fees prohibition applies to the particular activity of seeking and receiving attorneys' fees, but is irrelevant to the permissibility of the underlying legal work. Limiting the ability of recipients to seek and receive attorneys' fees only on current case work creates a distinction between some work and other work performed by a recipient *all of which was permissible when performed.* Such a distinction appears artificial and not necessary to effectuate Congress' intention.

Moreover, this variant creates another level of artificial distinction – that between work done on a particular case before and after the specified date. Under this scenario a recipient could claim attorneys' fees for some but not all work done in a particular case, even though all of the work was permissible. Again, it is difficult to see what purpose such a distinction serves and could prove to be unnecessarily administratively problematic for both recipients and LSC compliance staff.

New and Prior Work

The other main option for implementation would be to permit recipients to claim and collect and retain with respect to any work they have performed for which they may still be able to make a claim or otherwise be awarded fees. This option avoids the problem of making an artificial distinction between some work and other work, all of which was permissible when performed.

In addition, choosing this implementation option will, to the greatest degree, afford recipients the benefits of the lifting of the restriction. There may well be a number of ongoing cases where the newly available option of the potentiality of attorneys' fees will still be effective to level the playing field and afford recipients additional leverage with respect to opposing counsel in those cases. Likewise, being able to obtain attorneys' fees in cases in which prior

[13] See note 9, above.

work has been performed would likely help relieve more financial pressure on recipients than a "new work only" implementation choice would because it would increase sources and amount of work for which fees might potentially be awarded. In both of these ways, this option appears to better effectuate the intention of Congress.

A potential disadvantage to this approach could be a concern that permitting recipients to obtain attorneys' fees on prior work performed could potentially be unfair to opposing parties, particularly for work performed years ago during the period the restriction was in place. However, it is important to the remember that repealing the regulatory restriction would only open up to recipients the possibility of obtaining attorneys' fees. Any actual decision to award attorneys' fees would remain with the courts in which the cases were heard and the judges in those cases can be relied upon to take the overall equities of the situation into consideration before awarding a recipient attorneys' fees for prior work.

Other Provisions of Part 1642

Part 1642 also contains some additional provisions beyond the restriction (and other implementing provisions, such as definitions of attorneys' fees and the application of the prohibition to private attorneys participating in a recipient's Private Attorney Involvement Program pursuant to 45 CFR Part 1614. These additional provisions address the accounting for and use of attorneys' fees and the acceptance of reimbursement from a client. 45 CFR §§1642.5 and 1642.6 These provisions used to be incorporated into LSC's regulation on fee-generating cases at 45 CFR Part 1609, but were separated out and included in the new Part 1642 regulation when it was adopted.

Although the Board could amend or delete these provisions, the Board could simply leave these provisions substantively unchanged. Amending these provisions is not necessary to effectuate the lifting of the attorneys' fees restriction and they provide useful guidance to recipients. In fact, with recipients likely collecting and retaining fees more often than they have since 1996, the provision on accounting for and use of attorneys' fees will be of greater importance than it has been. Retaining this provision by regulation would continue to provide clear guidance to the benefit of both recipients and LSC.

Rulemaking Process Options

If the Board decides it wants to make substantive changes in LSC's policy to rescind the prohibition on attorneys' fees, the Board has several procedural options available to it. These are set forth below.

Option 1 – Initiate a Rulemaking and Request the Development and Publication of an Advance Notice of Proposed Rulemaking

If the Board wanted to initiate a rulemaking but was very unclear as to which policy direction it wanted to take, the Board could direct staff to develop and publish for comment an

Advance Notice of Proposed Rulemaking (ANPRM). An ANPRM often does not set forth specific proposed regulatory text changes, but instead sets forth questions and policy options upon which it seeks comment that the agency may formally consider in the development of an NPRM.

In this situation, the use of an ANPRM might afford the Board greater opportunity to garner public input, but such opportunity may not be necessary if there is a general consensus that the basic attorneys' fees prohibition should be rescinded. In such a case, the use of an ANPRM is not likely to afford the Board much more input than they are likely to get through the regular NPRM notice and comment process and will certainly delay the consideration and adoption of a final rule.

Option 2 – Initiate a Rulemaking and Request the Development of a Notice of Proposed Rulemaking, with or without the Convening of a Regulatory Workshop or a Negotiated Rulemaking

The Board could follow the standard procedure for Rulemaking under the LSC Rulemaking Protocol and determine to initiate a rulemaking and direct Staff to develop a Notice of Proposed Rulemaking (NPRM) consistent with any policy guidance provided by the Board in consideration of the various policy concerns and options set forth herein, management's recommendations and comments from the field and other interested members of the public. An NPRM could be developed within a few weeks and the Committee and the Board could meet prior to the regularly scheduled meeting to approve the NPRM for publication. After comment period (typically 30 days), a Draft Final Rule would be prepared and the Committee and Board could take up a Draft Final Rule at the April meeting (or possibly before then, depending on the number and complexity of the comments received).

The Board could include in its instructions a direction that a fact-gathering regulatory workshop be convened to discuss the policy choices and issues involved. Convening a regulatory workshop would allow for more informal consultation between LSC and interested parties before the development of an NPRM, but would also likely require additional time, delaying the consideration and adoption of a final rule. Further, it is not clear how much additional information will be brought forth at a regulatory workshop that LSC could not gain through a written comment period which would justify the additional time and expense required by convening such a workshop.

Alternatively, the Board could initiate a rulemaking and direct that it be conducted as a negotiated rulemaking. However, negotiated rulemakings are time, labor and cost intensive and generally reserved for issues where one is looking to make significant changes involving complex issues where a series of face-to-face negotiations will likely help the agency and the interested parties involved in the negotiation consider and work through a number of difficult factual and policy problems. Moreover, once the negotiated rulemaking is completed, LSC would still have to conduct a standard notice and comment rulemaking. The situation at hand does not appear to be a good candidate for a negotiated rulemaking.

Option 3 – Initiate a Rulemaking and Direct the Development and Publication of an Interim Final Rule with Request for Comments

Under this option, the Board could initiate a rulemaking and direct Staff to develop a Interim Final Rule and Request for Comments, consistent with policy guidance provided by the Board in consideration of the various policy concerns and options set forth herein, management's recommendations and comments from the field and other interested members of the public. OLA believes that this is a legally permissible option because LSC would be removing and not imposing any additional prohibitions or requirements on recipients and doing so in response to a specific statutory change removing a similar prohibition. An Interim Final Rule could be developed within a few weeks and the Committee and the Board could meet prior to the regularly scheduled meeting to approve the Interim Final Rule for publication. The Interim Final Rule would go into effect 30 days from the date of publication, and be the quickest way to afford recipients the benefit of the lifting of the prohibition. However, to ensure that recipients and the public had opportunity for comment, the Interim Final Rule could also provide for comment period. A Draft Final Rule would be prepared which would respond to any comments received and the Committee and Board could take up that Draft Final Rule at the April meeting (or possibly before then, depending on the number and complexity of the comments received).

Conforming Amendments to Part 1609 and Part 1610

Assuming the Board moves forward with rulemaking to remove the regulatory prohibition on attorneys' fees, there are conforming amendments to 45 CFR Parts 1609 and 1610 that the Board should consider making. These additional actions are discussed below.

Part 1609

As discussed above, Part 1642 contains provisions beyond the attorneys' fees prohibition which had, prior to the adoption of Part 1642, been included in LSC's fee-generating cases regulation at Part 1609. Repeal of Part 1642 without some action to move or retain these additional provisions could cause unintended problems. Amending Part 1642 to repeal the restriction but retain these other provisions would essentially leave them "orphaned" in Part 1642. This is an inelegant solution which may be, ultimately, more confusing for LSC and recipients. For these reasons a better option than either simply repealing or amending Part 1642 could be to repeal Part 1642, while at the same time revising Part 1609 to move those provisions of Part 1642 that retain utility back into the fee-generating cases regulation at Part 1609.

Although this would involve amending two regulations, rather than just one, it would not be significantly more complicated. A very limited rulemaking for Part 1609 to accomplish this could be undertaken concomitant with a rulemaking to repeal Part 1642. Moreover, this approach would have the long term advantage of having all of LSC's regulatory provisions regarding fees in one regulation, rather than two.

Finally, there is a cross reference in Part 1609 to the restriction in Part 1642 on claiming or collecting and retaining attorneys' fees that will become obsolete if the restriction is repealed. The Board could choose to do nothing with respect to this cross-reference. The referenced section would essentially be a null cross-reference of no effect. As such, leaving it in Part 1609 would not create a significant problem. However, having obsolete and meaningless regulatory provisions is not good regulatory practice and can at the very least lead to unnecessary confusion. This provides another good reason to include an action to amend Part 1609 at the time action is taken on Part 1642.

Part 1610

Part 1610 sets forth in regulation the application of the appropriations law restrictions to a recipient's non-LSC funds. Section 1610.2 sets forth the list of the restrictions as contained in section 504 of the FY 1996 appropriations act, and the implementing LSC regulations which are applicable to a recipient's non-LSC funds. Subsection (b)(9) is the provision that references the attorneys' fees restriction (504(a)(13) and Part 1642). With the current appropriations law no longer applying the restriction originally contained in section 504(a)(13), if the Board removes the restriction in Part 1642, section 1610.2(b)(9) will be obsolete.

The Board could choose to do nothing with respect to Part 1610. The referenced section would essentially be a null cross-reference of no effect. As such, leaving it in Part 1610 would not create a significant problem. Moreover, it may be that additional changes are made to the restrictions if the current reauthorization bills become law, which will result in other changes to Part 1610 that LSC may wish to make. Thus, it may make some sense to hold off for some time to see if additional rulemaking on Part 1610 is likely to be undertaken.

On the other hand, it is not at all clear if the reauthorization act will become law any time soon. Holding off on amending Part 1610 until more significant changes are necessary will allow a clearly obsolete and meaningless provision to remain in the regulation for an indeterminate period of time. Having obsolete and meaningless regulatory provisions is not good regulatory practice and can at the very least lead to unnecessary confusion. Accordingly, LSC could undertake a limited, technical rulemaking to remove section 1610.2(b)(9) and renumber the rest of the paragraph in connection with any other rulemaking it was undertaking to remove the attorneys' fees prohibition.

Enforcement Discretion Regarding Claims Made or Fees Accepted Between December 16, 2009 and the Effective Date of a New Regulation.

On December 17, 2009, LSC announced that, pending any rulemaking, LSC would suspend enforcement of the attorneys' fees prohibition as of December 16, 2009 (the date the appropriation law not containing the attorneys' fees restriction went into effect). Although separate from the rulemaking per se (since any new rule regarding the ability of recipients to claim or collect and retain attorneys' fees will be effective only as of the date of the adoption of a new rule), the Board's taking action to conduct a rulemaking does have an impact on the

enforcement discretion policy previously articulated. The Board may wish to take this time to articulate a further policy determination in this regard.

If the Board is going to remove the regulatory attorneys' fees restriction and permit recipients to include in claims and awards fees for prior performed work, the Board could determine that LSC will exercise its enforcement discretion and not take enforcement action against any recipient that filed a claim for or collected and retained attorneys' fees between the period of December 16, 2009 and the effective date of the regulation. Such a policy would appear to be consistent with the discussions the Board had in adopting the December 17, 2009 enforcement suspension policy and not inconsistent with Congress' intent that recipients be able to realize the benefits of the statutory change at the earliest possible date.

Alternatively, the Board could determine that actions taken during the interim period which amount to violations of Part 1642 will subject recipients (unless they qualified for the safe harbor announced in the December 17, 2009 policy guidance) to enforcement action. This course of action, however, does not appear consistent with Congressional intent and would not appear to serve any positive purpose.

If the Board removes the restriction, but chooses to limit the applicability of the change only to newly performed work, the board might want to consider adopting an enforcement policy consistent with the revised regulatory policy. That is, the board could determine that LSC will exercise its enforcement discretion and not take enforcement action against any recipient that filed a claim for or collected and retained attorneys' fees between the period of December 16, 2009 and the effective date of the regulation for work performed after December 16, 2009 only, but could take action against a recipient who claimed or collected fees for work performed prior to that date.. This would prevent a situation in which a recipient who waited for the rule change to file a claim for attorneys' fees could only seek fees for newly performed work, but a recipient who filed during the interim period being able to obtain attorneys' fees for prior performed work without adverse consequences.